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No.

Supreme Court, U. S.
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In the Supreme Court of the United States

OCTOBER TERM, 1979

WASTE MANAGEMENT OF WISCONSIN, INC.,

Petitioner,

vs.

CYNTHIA FOKAKIS,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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CYNTHIA FOKAKIS,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE SEVENTH CIRCUIT

The petitioner, Waste Management of Wisconsin, Inc., by its attorneys, Friebert & Finerty by Robert H. Friebert, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Seventh Circuit entered in this proceeding on February 1, 1980.

OPINION

The opinion of the United States Court of Appeals for the Seventh Circuit is reported at 614 F.2d 138 (7th Cir. 1980). A copy of this opinion appears in the Appendix at p. App. 1. The opinion of the district court appears in the Appendix at p. App. 8.

JURISDICTION

The judgment of the Court of Appeals for the Seventh Circuit was entered on February 1, 1980. This Petition for a Writ of Certiorari was filed within 90 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

QUESTION PRESENTED

Is a corporation absolutely barred from presenting claims to federal district courts that it has been deprived of its property and liberty interests in violation of rights, privileges and immunities guaranteed by the Fourteenth Amendment to the United States Constitution after a state court criminal proceeding which resulted in a state court criminal conviction against the corporation and the imposition of a money fine? The federal constitutional claims were persistently presented to all levels of the state courts, but the state courts did not fairly or fully consider the federal constitutional objections.

STATUTORY AND CONSTITUTIONAL PROVISIONS INVOLVED

CONSTITUTION OF THE UNITED STATES

Fourteenth Amendment

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATUTORY PROVISIONS INVOLVED

United States Code, Title 28, §1343, *Civil Rights and Elective Franchise:*

> The district courts shall have original jurisdiction of any civil action authorized by law to be commenced by any person:
>
> (1) To recover damages for injury to his person or property, or because of the deprivation of any right or privilege of a citizen of the United States, by any act done in furtherance of any conspiracy mentioned in section 1985 of Title 42;
>
> (2) To recover damages from any person who fails to prevent or to aid in preventing any wrongs mentioned in section 1985 of Title 42 which he had knowledge were about to occur and power to prevent;
>
> (3) To redress the deprivation, under color of any State law, statute, ordinance, regulation, custom or usage, of any right, privilege or immunity secured by the Constitution of the United States or by any Act of Congress providing for equal rights of citizens or of all persons within the jurisdiction of the United States;
>
> (4) To recover damages or to secure equitable or other relief under any Act of Congress providing for the protection of civil rights, including the right to vote.

United States Code, Title 42, §1983, *Civil Action for Deprivation of Rights:*

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

STATEMENT OF THE CASE

The petitioner is a Wisconsin corporation. Following two mistrials, it was convicted in a state criminal prosecution on a charge that it violated §133.01(1), Wis. Stats., the Wisconsin "Little Sherman Act". The petitioner was fined $4,000.00. The appellate avenues available to the petitioner in the state court system were fully exhausted thereafter, but to no avail, the Wisconsin Supreme Court affirming the petitioner's conviction in *State of Wisconsin* v. *Waste Management of Wisconsin, Inc.*, 81 Wis.2d 555, 261 N.W.2d 147 (1978). A Petition for a Writ of Certiorari was filed with this Court to review the decision of the Supreme Court of the State of Wisconsin, but that petition was denied. *Waste Management of Wisconsin, Inc.* v. *Wisconsin*, 439 U.S. 865 (1978).

As alleged in the complaint, at all stages and levels of the state court proceedings, beginning with pretrial motions, the petitioner objected to various deprivations of its federal constitutional rights. At each stage of the proceeding at the trial level the petitioner was denied such rights, was denied a fair hearing with respect to the question of denial of such rights, or was treated in a fashion which infringed other rights. The Wisconsin Supreme Court refused to correct any of the federal constitutional violations visited upon the petitioner and further refused to even consider most of the claims made concerning such violations.[1]

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[1] The Court of Appeals acknowledged that the complaint at this stage of the proceedings must be accepted as true. The Court of Appeals summarized the complaint as follows:

> "The complaint submitted to the district court sets forth with particularity the trial defects that serve as the basis for the

(Footnote continued)

Since the petitioner is a corporation and, therefore, not eligible for federal review by way of habeas corpus pursuant to 28 U.S.C. § 2254, this action was begun under 42 U.S.C. § 1983. The principal relief sought was a declaration of the constitutional invalidity of the state court conviction as a result of the wholesale denials of constitutional rights of the plaintiff underlying the state court conviction and a return of the $4,000.00 fine. The action was brought against the clerk of the State Circuit Court which entered the judgment of conviction since she was charged with the duty of maintaining the record of conviction challenged. The clerk is the person charged by Wisconsin law with receiving fines.

The respondent moved to dismiss the complaint raising the fundamental question of whether a § 1983 action was available to a corporation to attack a state court criminal conviction. Four days after this action was commenced, the United States Court of Appeals for the Seventh Circuit handed down its decision in *Hanson* v. *Circuit Court of the First Judicial Circuit of Illinois,* 591 F.2d 404 (7th Cir. 1979), cert. den. ..... U.S. ..... (1979); Ap. 9,

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(footnote continued)

Corporation's allegations of constitutional infirmity. The Corporation alleges errors of constitutional dimension in the failure of the prosecutor to present potentially exculpatory material to the grand jury, improper amendment of the grand jury indictment without representment, admission of evidence secured by illegal electronic surveillance, improper prosecutorial statements, and conveyance of erroneous instructions to the jury. Since this case is before us on appeal of a grant of a motion to dismiss, we assume that the allegations contained in the complaint are true and that at no point in the state proceedings were the Corporation's constitutional objections fairly considered." 614 F.2d at 139, f/n 2; Ap. 2.

which held that an individual convicted of a crime who received a fine-only sentence could not bring a federal civil rights action to challenge his conviction. (Ap. 4). On the strength of the *Hanson* decision, the District Court granted the motion to dismiss on the sole ground that the court lacked subject matter jurisdiction. (Ap. 8).

An appeal was taken to the Court of Appeals for the Seventh Circuit. That court held that the jurisdictional question involved was "one of first impression" and ruled that federal district courts did not have jurisdiction to review the constitutional propriety of a state court criminal conviction of a corporation. The petitioner seeks review of this jurisdictional question of "first impression."

REASONS RELIED ON FOR ALLOWANCE OF WRIT

I.

THE DECISION IN THIS CASE IS IN CONFLICT WITH DECISIONS OF OTHER COURTS OF APPEAL.

The Court of Appeals held that habeas corpus was the sole method for attacking any criminal conviction. The specific rationale of the United States Court of Appeals for the Seventh Circuit in denying relief to the petitioner was that Congress did not grant jurisdiction to federal courts "to entertain a civil rights suit under § 1983 collaterally attacking a state court criminal conviction" even though the person convicted was "ineligible for habeas corpus relief." (Ap. 3).

Other courts of appeal have held with respect to individuals that § 1983 granted federal jurisdiction to attack state court criminal convictions when habeas corpus relief was unavailable because the individual was not in custody when the action was commenced. This conflict was recognized by the Court of Appeals for the Seventh Circuit.

> "A conflict exists among the circuits that have considered this question. *See Hanson* v. *Circuit Court of the First Judicial Circuit of Illinois,* 100 S.Ct. 220 (1979) (denying certiorari) (White, J., dissenting). The Fourth and Ninth Circuits, *see Strader* v. *Troy,* 571 F.2d 1263 (4th Cir. 1978); *Shipp* v. *Todd,* 568 F.2d 133 (9th Cir. 1978), likely would have entertained a section 1983 action under these facts. Our decision in *Hanson* was in accord with the Fifth Circuit. *See Cavett* v. *Ellis,* 578 F.2d 567 (5th Cir. 1978)." 614 F.2d 140, f/n 5, Ap. 3.

Since a corporation can never bring an action as a habeas corpus petitioner,[2] the Court of Appeals for the Seventh Circuit held that a corporation can *never* obtain federal review in the district courts of federal constitutional deprivations which occur or are considered in the setting of a state criminal proceeding. This holding alone, coupled with the difference of opinion among the courts of appeal makes this jurisdictional issue of first impression of sufficient magnitude to warrant the granting of the writ of certiorari.

II.

THE DECISION OF THE COURT OF APPEALS IS IN CONFLICT WITH DECISIONS OF THIS COURT.

The Court has never held that a corporation cannot seek redress of its federal constitutional claims in a United States District Court by utilizing the Federal Civil Rights Act. Indeed, it was settled as early as 1886 that the Fourteenth Amendment protected corporations. In *Santa Clara County* v. *Southern Pacific Railroad,* 118 U.S. 394 (1886), Chief Justice Waite tersely stated the following:

> "The Court does not wish to hear argument on the question whether the provison in the Fourteenth Amendment to the Constitution which forbids a State

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[2] An individual who is only fined can obtain federal review of his conviction. An individual has the option to refuse to pay the fine which would result in his being taken into custody. He could then file a petition for a writ of habeas corpus and, after the filing of the petition, the individual can then remove himself from custody by paying the fine. The custody standards for federal habeas purposes are met if the petitioner is in custody when the petition is filed. Subsequent release from custody does not impair federal jurisdiction nor does it render the case moot. *Carafas* v. *LaVallee,* 391 U.S. 234 (1968). See also *Hensley* v. *Municipal Court,* 411 U.S. 345 (1973); and *Jones* v. *Cunningham,* 371 U.S. 236 (1963).

> to deny to any person within its jurisdiction the equal protection of the laws, applies to these Corporations. *We are all of the opinion that it does.*" [Emphasis supplied] *Id.* at 396.

Since the Federal Civil Rights Act of 1871 was enacted to implement the Fourteenth Amendment to the United States Constitution, *Monroe* v. *Pape,* 365 U.S. 167 (1961), that Act protects the constitutional rights of corporations. *Monell* v. *New York City Dept. of Soc. Serv.,* 436 U.S. 658, 687-688 (1978).

Corporations' commercial activities, both interstate and intrastate, are regulated by a wide variety of legal mechanisms. Corporations are directly controlled by state or municipal law. Corporate activities are regulated by state or municipal agencies. These laws and regulations are enforced in civil actions brought by the state or a municipality. And corporations are often prosecuted for alleged violations of law or administrative rules. Each and every one of these means for controlling corporations can result in monetary judgments, injunctions, forfeitures or fines. Each of these means of regulation can impair the good name and reputation of a corporation. The result can be the same to a corporation whether the proceeding is labeled civil, regulatory, administrative or criminal. A criminal conviction is the most serious branding of a corporation.

Each of these means of regulating a corporation can violate the due process and equal protection rights of a corporation as guaranteed by the Fourteenth Amendment to the United States Constitution. There is no good reason advanced by the Court of Appeals for the Seventh Circuit why a corporation cannot obtain federal review of alleged federal constitutional deprivatons considered or occurring in the context of a state criminal setting by

utilization of the Federal Civil Rights Act. The basic rationale of the Court of Appeals was a finding of "Congressional intent that § 2254 be the sole avenue of collateral attack of state court convictions." (Ap. 6). This analysis was taken from its earlier decision in *Hanson* to the following effect:

> "We think that Congress intended that habeas corpus provide not only the exclusive federal remedy for those in custody, but also the exclusive federal remedy for all who seek to attack state court judgments of conviction." 591 F.2d at 410, Ap. 12.

In reaching this conclusion, the Court of Appeals was unable to point to any single statement which would support a finding of such a Congressional intent. Furthermore, that analysis is inconsistent with the decisions of this Court.

In *Preiser* v. *Rodriguez,* 411 U.S. 475 (1973), the Court was presented with the question whether the Civil Rights Act could be utilized by a prisoner to question the fact or duration of his incarceration. The Court specifically recognized that the Civil Rights Act covered all types and manner of constitutional violation. However, the Court went on to hold that the general applicability of the Civil Rights Act must yield to the specific applicability of the federal habeas corpus statute. The Court concluded that the Habeas Corpus Act was the Congressionally devised exclusive method for "attacking the validity of the fact or length of . . . confinement, and that specific determination must override the general terms of § 1983." *Id.* at 490.[3] Since the Habeas Corpus Act can never be applicable to corporations, the general terms of § 1983 would then

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[3] The underlying issue was whether the prisoner had to exhaust the state remedies before commencing a federal action. Here, the corporation had already exhausted all of its state remedies prior to commencing this civil rights action.

provide the appropriate federal jurisdiction pursuant to *Preiser.*

The Court of Appeals for the Seventh Circuit improperly held that the Habeas Corpus Act included within its parameters all challenges to state criminal court convictions while this Court in *Preiser* defined the scope of the Habeas Corpus Act in terms of challenges to the fact or duration of confinement. Additionally, the Court of Appeals for the Seventh Circuit erred when it narrowly read the Civil Rights Act to exclude challenges to unconstitutional convictions while this Court held in *Preiser, Monroe* v. *Pape, supra,* and *Mitchum* v. *Foster,* 407 U.S. 225, 240 (1972) that the Civil Rights Act contains within its general terms all challenges to all alleged deprivations of federal constitutional rights, but that this general grant of jurisdiction must yield to the specifics of the Habeas Corpus Act when that Act is applicable. Just this term, the Court once again noted "the expansive sweep of the statutory language" of § 1983. *Owen* v. *City of Independence,* ..... U.S. ....., Slip Op. at 12-14, 20, f/n 25 (1980). Indeed, in *Preiser,* the Court recognized that litigation seeking "something other than immediate or more speedy release —the traditional purpose of habeas corpus" can properly be brought under the Civil Rights Act. 411 U.S. at 494. See also *Id.* at 492, f/n 10.

The Court also held in *Huffman* v. *Pursue, Ltd.,* 420 U.S. 592 (1975) that a federal civil rights action under most circumstances is not available to interrupt ongoing state litigation. The corporation here is not seeking to interrupt state litigation. This action was brought at the conclusion of state litigation to determine whether the state courts refused to recognize federal rights, privileges and immunities. The Court of Appeals mistakenly read *Huffman* to bar a § 1983 action even after the termination of state

litigation. Cf. *Juidice* v. *Vail,* 430 U.S. 327 (1977) and *Moore* v. *Sims,* 442 U.S. 415 (1979).

The Court of Appeals for the Seventh Circuit confused the decisions of this Court with respect to res judicata, collateral estoppel and comity as creating an *absolute* bar to any access to federal district courts by a corporation to challenge a state court criminal conviction. The Court has implied that res judicata principles might be applicable to civil rights actions. *Preiser* v. *Rodriguez,* 411 U.S. 475, 497 (1973). Neither lower federal court here reached that question. Res judicata or collateral estoppel are affirmative defenses in civil actions. Rule 8(c), Fed.R.Civ.P. This action was dismissed on initial jurisdictional objections which had nothing whatsoever to do with any claimed affirmative defense, such as res judicata or collateral estoppel. Additionally, if these doctrines are applicable to civil rights actions, such defenses would not be appropriate here. The Court of Appeals noted that the complaint asserts "that at no point in the state proceedings were the corporation's Constitutional objections fairly considered." 614 F.2d at 139, f/n 2; Ap. 2. If this were found to be the case, neither collateral estoppel nor res judicata would be applicable to support dismissal of this action. *Stone* v. *Powell,* 428 U.S. 465, 494 (1963); *Juidice* v. *Vail,* 430 U.S. 327, 337 (1977); *Moore* v. *Sims,* 442 U.S. 415, 430, f/n 12 (1979).

With respect to comity principles, the underlying premise of the Court of Appeals is that state courts at all times will vindicate corporations' federal constitutional rights.[4]

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[4] Comity usually only requires federal deference until after the state courts have the opportunity to decide the issues. Here the state court proceedings had been completed prior to the commencement of this action.

There is no reason to assume that state courts will at all times be solicitous of corporate constitutional rights.[5] Historically, the Civil Rights Act was passed to provide federal relief where any state instrumentality, including courts, fails to enforce the Fourteenth Amendment. *Mitchum* v. *Foster,* 407 U.S. 225, 240 (1972); *Ex Parte Virginia,* 100 U.S. 339, 346 (1880). Any *absolute* bar to access to the federal district courts emasculates the Civil Rights Act and blinks at history. A corporation, at least under the circumstances alleged here, should not be dismissed out of federal court at the incipient stages of litigation.

III.

CONGRESS DID NOT INTEND TO LIMIT A CORPORATION'S ACCESS TO THE FEDERAL COURTS UNDER THE CIVIL RIGHTS ACT WHEN A CORPORATION'S FOURTEENTH AMENDMENT RIGHTS ARE NOT ENFORCED OR VIOLATED IN STATE COURT PROCEEDINGS OF ANY KIND.

In *Monroe* v. *Pape,* 365 U.S. 167 (1961), *Monell* v. *New York City Dept. of Soc. Serv.,* 436 U.S. 658 (1978), and *Owen* v. *City of Independence,* ..... U.S. ..... (1980), the legislative history of the Civil Rights Act of 1871 was reviewed at length. That debate was summarized as follows:

> "The debates were long and extensive. It is abundantly clear that one reason the legislation was passed was to afford a federal right in federal courts because,

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[5] This is not to say that state courts cannot be trusted to enforce federal constitutional rights. However, neither Congress nor the Court has ever *assumed* that states will always do so. The Civil Rights Act provides the Congressionally created mechanism to continuously test the states' fidelity to the federal constitution.

> by reason of prejudice, passion, neglect, intolerance or otherwise, state laws might not be enforced and the claims of citizens to the enjoyment of rights, privileges, and immunities guaranteed by the Fourteenth Amendment might be denied by the state agencies." *Monroe,* 365 U.S. at 180.

Prior to the enactment of the Civil Rights Act of 1871, Congress considered the passage of a bill which would have specifically extended to insurance corporations the privileges and immunities as guaranteed by the constitution.[6] Although that bill was defeated in the House on February 15, 1871, parts of the debate are relevant to this case since corporations were ultimately provided with protection when the Civil Rights Act of 1871 was passed a few months later. During the debate, discussion turned to remedies. The following colloquy took place:

> "Mr. LOGAN. I see there is no penalty provided for violating the provisions of this bill. Now, will the gentleman please state to the House what the remedy would be if a State should refuse to obey this law? Will Congress legislate the State out of the Union?
>
> Mr. BUTLER, of Massachusetts. Will the gentleman tell me what remedy there is—
>
> Mr. LOGAN. I am not answering a question. I want the gentleman to answer my question.

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[6] H.R. No. 349, 42d Cong., 1st Sess. (1871). The specific debate was on a substitute which read:

> "Strike out all after the enacting clause and insert the following: That no penalty shall be imposed on any life insurance company incorporated by any State, on account of any action by such company which is authorized by the laws of the United States; nor shall any tax or other condition of doing business be imposed upon any such company which is not by the same authority imposed upon all life insurance companies." Cong. Globe, 42d Cong., 1st Sess., 1288 (1871).

> Mr. BUTLER, of Massachusetts. I will answer it in the Yankee way, by asking another. What remedy is there when any State refuses to obey any constitutional law of Congress? The remedy for the party—not the penalty upon the State—the remedy for the party against whom the State shall undertake to enforce a State law, contrary to the legislation of Congress, *would be at once to get an injunction from the United States courts.* That is the remedy. The United States courts cannot now enjoin because there is no law of Congress that reaches the case.
>
> Mr. LOGAN. I want the gentleman to answer my question, so that the House will understand it, or, at least, so that I can understand it.
>
> Mr. BUTLER, of Massachusetts. Pardon me; I will not engage to do that. [Laughter.]
>
> Mr. LOGAN. If Congress provides that a State shall not pass a certain law, what remedy has a party should the State still pass such a law?
>
> Mr. BUTLER, of Massachusetts. *If anyone should undertake to enforce any penalty prescribed by such a State law, the remedy would be to apply to the United States court for an injunction.*" (Emphasis supplied) Cong. Globe, 42d Cong., 1st Sess. 1289-90 (1871).

After the defeat of this bill, Congress on February 25, 1871 passed the Dictionary Act which stated in part that "the word 'person' may extend and be applied to bodies politic and corporate". Act of Feb. 25, 1871, §2, 16 Stat. 431. Thus, the Civil Rights Act of 1871 reference to "persons" which was adopted a few months later, fully protected corporations. *Monell* v. *New York City Dept. of Soc. Serv., supra,* 436 U.S. at 688-89. The 42nd Congress was well aware that procedurally corporations would be allowed to seek injunctive relief in federal courts to vindicate their federally guaranteed constitutional rights.

In addition to the lengthy analysis of the debate in Congress set forth in *Monroe* and *Monell,* a specific reference was made during debate to circumstances where habeas corpus might not be an appropriate or effective remedy as a justification for passing the Civil Rights Act of 1871. Representative Snyder discussed the ineffectiveness of habeas corpus in the following statement:

> "But, Mr. Speaker, we have heard a great deal during this debate about Magna Charta, *habeas corpus,* and the Bill of Rights. Well, sir, I have contemplated with emotions of pride and gratitude that bright era in history when Magna Charta was extorted from the hand of power; I, too, appreciate the value of the great writ of *habeas corpus,* and regard it as one of the bulwarks of liberty, and have meditated with pleasure upon that sacred Bill of Rights reserved to the people. But, sir, of what value are any or all of these to the suffering loyalists of North Carolina today? To them they live but in name, and eloquent disquisition upon them here is but the voice of solemn mockery in their eras. Ay, Mr. Speaker, their Bill of Rights is the right to be scourged, whipped, lacerated, robbed, tortured, hung, and murdered, and the only *habeas corpus* that reached their poor bodies is the midnight decree of a Klan, signed in blood by the chief of the den. Colonel McKay, of Charleston, South Carolina, who was attached to the staff of General Price, while he was stationed at Little Rock and Camden, Arkansas, and who was a brave and acceptable confederate soldier, told me in this building yesterday that ten colored men were imprisoned in South Carolina, and, as was supposed by some, unlawfully. Application for writs of *habeas corpus* in favor of each was made and granted. How were they served? The next morning, instead of seeing the bodies of the prisoners before the court, as the writs directed, the whole ten were seen hanging to the trees, cold and stiff in death, with the writs pinned to their bosoms. Why should Democratic members go into spasms about suspending

> the writ of *habeas corpus* in the Carolinas, when it has been virtually suspended for months, as is evidenced by the case above cited, in which it appears that ten of said writs were suspended—from a tree—all at one time?'' Cong. Globe, 42d Cong., 1st Sess., App. 202 (1871).

There appears to be absolutely no historical support for the stark conclusion of the Court of Appeals for the Seventh Circuit that persons convicted of crime can only utilize the Habeas Corpus Act to obtain relief in the United States District Court. Congress knew that there were circumstances when habeas corpus would not provide appropriate relief and Congress earlier in 1871 clearly recognized that, for corporations, injunctive relief by district courts was an appropriate method to obtain enforcement of federally guaranteed constitutional rights.

CONCLUSION

On the basis of the foregoing it is respectfully requested that this Court issue a writ of certiorari to review the judgment and opinion of the Seventh Circuit.

Dated this 22 day of April, 1980.

Respectfully submitted,

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APPENDIX

APPENDIX

In the

United States Court of Appeals

For the Seventh Circuit

No. 79-1530

WASTE MANAGEMENT OF WISCONSIN, INC.,

Plaintiff-Appellant,

v.

CYNTHIA FOKAKIS,

Defendant-Appellee.

Appeal from the United States District Court for the Western District of Wisconsin, Madison Division.
No. 79-C-41—James E. Doyle, *Judge.*

Argued November 30, 1979—Decided February 1, 1980

Before SWYGERT, CUMMINGS, and WOOD, *Circuit Judges.*

WOOD, *Circuit Judge.* The determinative issue on appeal, and one of first impression, is whether federal courts have jurisdiction to hear a corporation's collateral attack under the Civil Rights Act, 42 U.S.C. § 1983,[1] of its state

[1] 42 U.S.C. § 1983 provides:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

court criminal conviction. In light of the procedural posture in which the case reaches us, we outline the pertinent facts below in the light most favorable to appellant, Waste Management of Wisconsin, Inc. (the Corporation).

The Corporation was convicted by a Wisconsin trial court and fined $4,000 for violating that state's "Little Sherman Act." Wis. Stat. § 133.01(1). Before and during trial, the Corporation interposed numerous objections to various deprivations of its federal constitutional rights, which the court overruled.[2] The trial court's actions were affirmed on appeal to the Wisconsin Supreme Court, *State* v. *Waste Management of Wisconsin, Inc.*, 81 Wis. 2d 555, 261 N.W.2d 147 (1978), and the United States Supreme Court denied certiorari. *Waste Management of Wisconsin, Inc.* v. *Wisconsin*, 439 U.S. 865 (1978). The Corporation then brought suit in federal district court under section 1983 against the clerk of the state court seeking, *inter alia*, a declaration of the constitutional invalidity of the state court conviction.[3] The district court granted appellee's

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[2] The complaint submitted to the district court sets forth with particularity the trial defects that serve as the basis for the Corporation's allegations of constitutional infirmity. The Corporation alleges errors of constitutional dimension in the failure of the prosecutor to present potentially exculpatory material to the grand jury, improper amendment of the grand jury indictment without representment, admission of evidence secured by illegal electronic surveillance, improper prosecutorial statements, and conveyance of erroneous instructions to the jury. Since this case is before us on appeal of a grant of a motion to dismiss, we assume that the allegations contained in the complaint are true and that at no point in the state proceedings were the Corporation's constitutional objections fairly considered.

[3] The Corporation also seeks expungement of the record of its conviction, return of the fine and costs paid upon conviction, and an injunction restraining appellee from taking any action based on the record of that conviction.

motion to dismiss for lack of subject matter jurisdiction. We affirm.

In *Hanson* v. *Circuit Court of the First Judicial Circuit of Illinois,* 591 F.2d 404 (7th Cir.), *cert. denied,* 100 S. Ct. 220 (1979), we answered in the negative the question whether Congress vested federal courts with jurisdiction to entertain a civil rights suit under section 1983 collaterally attacking a state court criminal conviction of an *individual* not held in custody and therefore ineligible for habeas corpus relief.[4] Habeas corpus, we said, is "the exclusive federal remedy for *all* who seek to attack state court judgments of convictions." *Id.* at 410 (emphasis added). Despite the seemingly broad scope of that statement of law, we intended that the word "all" be limited by the facts presented to natural persons.[5] Further analysis is therefore required before applying *Hanson* to a corporate defendant.

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[4] A conflict exists among the circuits that have considered this question. *See Hanson* v. *Circuit Court of the First Judicial Circuit of Illinois,* 100 S. Ct. 220 (1979) (denying certiorari) (White, J., dissenting). The Fourth and Ninth Circuits, *see Strader* v. *Troy,* 571 F.2d 1263 (4th Cir. 1978); *Shipp* v. *Todd,* 568 F.2d 133 (9th Cir. 1978), likely would have entertained a section 1983 action under these facts. Our decision in *Hanson* was in accord with the Fifth Circuit. *See Cavett* v. *Ellis,* 578 F.2d 567 (5th Cir. 1978).

[5] The noncorporate petitioner in *Hanson* was convicted in state court of unlawful use of weapons and fined $150. He thereupon filed a petition for a writ of habeas corpus in federal district court, alleging denial of appellate counsel and a transcript because of indigency violated his rights under the fourteenth amendment to due process and equal protection. Concluding that imposition of a fine without more did not satisfy the custody requirement of 28 U.S.C. § 2254, the district court dismissed the petition. We affirmed and also disposed of the petitioner's altternative attempt, raised for the first time on appeal, to invoke federal jurisdiction under section 1983.

The individual petitioner in *Hanson,* though unable to secure habeas corpus review of his conviction, on which a fine was the sole sanction imposed, would have been able to do so had his liberty been sufficiently restrained to constitute custody. The parties concede that a corporate petitioner can never secure habeas corpus review under the present statute because a corporation's entity status precludes it from ever being incarcerated or otherwise held in custody.[6] *See generally Fletcher Cyclopedia Corporations* § 4942 (1978). The core of the case, therefore, is whether this distinction requires a different result here, that is whether Congress vested federal courts with jurisdiction to hear a corporation's collateral attack under section 1983 of its "fine-only" conviction but not a collateral attack based on the same statute brought by a similarly situated individual.

A brief review of our reasons for holding in *Hanson* that jurisdiction was lacking will advance our inquiry. Underlying our decision was the recognition that collateral attack in the federal courts on the validity of a state court conviction is an extraordinary intrusion on the independent functioning of the state judicial system. *See also*

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[6] Although recent case law has expanded the notion of custody, *see Hensley* v. *Municipal Court,* 411 U.S. 345 (1973) (release on personal recognizance prior to imprisonment constitutes custody); *Carafas* v. *La Vallee,* 391 U.S. 234 (1968) (custody determined when petition filed; subsequent release does not render case moot); *Jones* v. *Cunningham,* 371 U.S. 236 (1963) (prisoner released on parole is in custody); *Developments in the Law—Habeas Corpus,* 83 Harv. L. Rev. 1038, 1073-79 (1970), a nexus with a physical restraint is still required. *See Preiser* v. *Rodriguez,* 411 U.S. 475 486 (1973). The Supreme Court has described this recent case law development as "no more than a logical extension of the traditional meaning and purpose of habeas corpus—to effect release from illegal custody." *Id.* at 486 n.7.

Stone v. *Powell,* 428 U.S. 465, 491, n.31 (1976); *cf. Wooley* v. *Maynard,* 430 U.S. 705 (1977); *Huffman* v. *Pursue, Ltd.,* 420 U.S. 592 (1975); *Preiser* v. *Rodriguez,* 411 U.S. 475 (1973). Ordinarily, considerations of comity and federalism militate against allowing such an intrusion. The constraints on individual liberty inherent in the notion of custody are also an extraordinary intrusion. *See Ellis* v. *Dyson,* 421 U.S. 426, 440-41 n.6 (1975) (Powell, J., dissenting). However, there the intrusion is not on a judicial system but on an individual at the mercy of a judicial system that may have acted beyond its authority or without basic procedural fairness. Section 2254 of the Habeas Corpus Act, 28 U.S.C. § 2254, which incorporates the common law custody requirement, represents the balance Congress struck between the interest of the individual in remaining free of unlawful intrusion on his physical freedom and the state courts' interest in remaining free of federal interference with their final judgments. *See generally Developments in the Law—Section 1983 and Federalism,* 90 Harv. L. Rev. 1133, 1337-38 (1977).

In contrast to the narrow specificity with which section 2254 is drawn, section 1983 speaks in the broadest of terms.[7] We recognized in *Hanson* that were we to allow an individual to use the broader statute to collaterally attack a "fine-only" conviction, the balance Congress struck would be applied in circumstances where the individual's interest is not as compelling.

The appellant in the case at bar argues that since corporations can never satisfy the custody requirement of section 2254, Congress must have intended that they be allowed to travel an alternate route to collateral review. Unable to point to any specific expressions of congressional intent, the Corporation relies instead on the notion that a

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[7] The text of section 1983 is reproduced in note 1 *supra.*

contrary holding would be inconsistent with the role of federal courts as ultimate arbiters of federal rights. In so arguing, the Corporation points to a recent case from the United States Court of Appeals for the Eighth Circuit—*McCurry* v. *Allen,* 606 F.2d 795 (8th Cir. 1979), *petition for cert. filed,* 48 U.S.L.W. 3414 (Jan. 1, 1980). At issue in *McCurry* was the right of an individual convicted in the state court to bring a section 1983 action against individual police officers for damages arising from a search and seizure, the legality of which had been fully and fairly litigated at a suppression hearing incident to his trial. The federal district court dismissed the action on the ground that the doctrine of collateral estoppel precluded relitigation of that question. *McCurry* v. *Allen,* 466 F. Supp. 514 (E.D. Mo. 1978). In reversing, the Eighth Circuit relied on the unavailability of habeas corpus to vindicate fourth amendment search and seizure claims that have been fully and fairly litigated in state court proceedings. *Stone* v. *Powell, supra.* Since habeas corpus was unavailable and in light of the "special role of federal courts in protecting civil rights," 606 F.2d at 799, the court allowed the plaintiff to proceed with his section 1983 damages action unencumbered by the preclusive effect of collateral estoppel.

The Corporation asks this court to apply analogous reasoning to its attempt to secure a declaration that its conviction is constitutionally infirm. In so doing, the Corporation misconstrues the basis of our decision in *Hanson,* which was firmly rooted in congressional intent that section 2254 be the sole avenue of collateral attack of state court convictions. *Hanson* did not rest on the potential cognizability of the type of claim in habeas corpus proceedings or on the fact that the plaintiff's status as an individual would under proper circumstances allow him to secure habeas corpus review. We, too, believe federal

courts have a special role in protecting federal rights. But that does not mean state courts do not also have a legitimate role, which, in this area, is not to be infringed absent express congressional authorization. As we said in *Hanson,* "[d]irect review by the United States Supreme Court is sufficient to preserve the role of the federal courts as the ultimate guardians of federally guaranteed rights." 591 F.2d at 411.

The Corporation's position is untenable also because it seeks not parity with similarly situated individuals but preferential treatment. That a corporation cannot be imprisoned or otherwise placed in custody is an incident of the status conferred on it as an entity wholly distinct from its shareholders. As such, it is one of many benefits conferred on the corporate form—*e.g.,* limited liability of shareholders for corporate debts—for the purpose of facilitating capital formation. The corporate form similarly insulates shareholders from liability for the crimes of the corporations in which they hold stock. If our corporate system were so drastically different that we subjected shareholders to imprisonment, habeas corpus relief certainly would be available in appropriate circumstances. But to couple such a beneficial incident of the corporate form with elimination of a custody requirement for collateral attack of state court convictions would place corporations in a far more desirable position than individuals fined under state court judgments of conviction. Absent any showing of congressional authorization for such a result, and in light of possible problems posed by the equal protection guarantee of the fifth amendment, we hold that the relief the Corporation seeks is beyond the scope of protection Congress intended and beyond the scope of benefits inhering in the corporate form. We therefore decline to limit *Hanson* and here reaffirm that habeas corpus is the exclusive federal route to collateral attack of state court convictions.

There being no subject matter jurisdiction, we affirm the district court's grant of the motion to dismiss without addressing those issues dependent on a contrary finding.

AFFIRMED

A true Copy:
Teste:

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Clerk of the United States Court of Appeals for the Seventh Circuit

JUDGMENT

(Formal Parts Omitted)

This action came on for consideration before the Court, Honorable James E. Doyle, United States District Judge, presiding, and the issues having been duly considered and a decision having been duly rendered,

It is Ordered and Adjudged defendant's motion to dismiss is granted with costs.

Dated at Madison, Wisconsin this 13th day of April, 1979.

/s/ Joseph W. Skupniewitz
Clerk of Court

ORDER

(Formal Parts Omitted)

Defendant's motion to dismiss this action on the ground that this court lacks subject matter jurisdiction is granted. *Hanson* v. *Circuit Court of First Judicial Circuit,* 591 F.2d 404 (7th Cir. 1979).

Entered this 12th day of April, 1979.

BY THE COURT:
/s/ James E. Doyle
District Judge

Excerpts from Hanson v. Circuit Court of the First Judicial Circuit of Illinois, 591 F.2d 404 (7th Cir. 1979)

In the

United States Court of Appeals

For the Seventh Circuit

No. 78-1296

KENNETH WARREN HANSON,

Petitioner-Appellant,

v.

CIRCUIT COURT OF THE FIRST JUDICIAL CIRCUIT OF ILLINOIS,

Respondent-Appellee.

Appeal from the United States District Court for the Eastern District of Illinois, East St. Louis Division.

Civ. No. 77-4158—*James L. Foreman,* Judge.

Argued November 30, 1978—Decided January 29, 1979

Before Fairchild, *Chief Judge,* Pell and Wood, *Circuit Judges.*

Wood, *Circuit Judge.* The petitioner, Kenneth Warren Hanson, appeals to this court from the trial court's dismissal of his petition for a writ of habeas corpus. Three questions are raised. First, is a fine-only conviction a sufficient restraint on liberty to constitute "custody" within the meaning of the federal habeas corpus statute, 28 U.S.C. § 2254? Second, if not, does the consideration of one state's judgment of conviction by parole authorities in another state cause the prisoner to be in the custody of authorities

of the state which rendered the conviction? Third, if a convicted person cannot maintain a habeas corpus action because he is not in custody, can he maintain an action under 42 U.S.C. § 1983 to challenge the conviction? Finding that the answer to each of the questions is no, we affirm the dismissal of the petition.

I. The Facts

On December 16, 1975, after a trial in which he was represented by counsel, petitioner was found guilty of unlawful use of weapons by a Jackson County, Illinois, jury. Petitioner was fined $150. Petitioner filed a timely *pro se* notice of appeal and requested the trial court, the Illinois Appellate Court and the state appellate defender to provide counsel for his appeal. Although petitioner alleged that he was indigent, owned no personal or real property, and had only thirty dollars in cash, his requests for counsel were denied. Petitioner's request for a transcript of proceedings before the trial court and a common law record in order to perfect his appeal was also unavailing.

On March 5, 1976, petitioner was removed from the custody of Illinois authorities. He was taken by California officials to California, tried and convicted of a crime which does not appear in the record, and committed to the custody of the Director of the California Department of Corrections. In May 1977, on the motion of the State's Attorney for Jackson County, petitioner's appeal of the Illinois weapons conviction was dismissed for lack of diligent prosecution. Petitioner remains in the custody of California officials until the present time.

Petitioner filed his petition for a writ of habeas corpus in the federal district court in the Eastern District of Illinois in 1977. He maintained there, and urges upon us

here, that he was denied appellate counsel and a transcript because of indgency contrary to requirements of the equal protection and due process clauses of the Fourteenth Amendment. *See Griffin* v. *Illinois,* 351 U.S. 12 (1956); *Douglas* v. *California,* 372 U.S. 353 (1963); *Mayer* v. *City of Chicago,* 404 U.S. 189 (1971). The district court, however, never reached the merits of petitioner's claim. It held that "the mere imposition of a fine is an insufficient restraint to satisfy the custody requirement" of the federal habeas corpus statute and dismissed the petition.

* * * *

IV. Relief Under Section 1983

Petitioner's alternative position is that if we find that the district court was without jurisdiction to consider his petition sounding in habeas corpus, the petition nevertheless alleges a valid cause of action under 42 U.S.C. § 1983. Petitioner maintains that Congress had a "unity of purpose" in enacting section 1983 and the habeas corpus statute—a purpose to make one or the other of the statutes available to ensure the role of the federal courts as the ultimate guardians of federal rights. Although petitioner acknowledges that sometimes neither statute provides an appropriate remedy for the violation of federal civil rights, *cf. Stone* v. *Powell,* 428 U.S. 465 (1976), he contends that only clear statutory directives or compelling reasons of judicial policy should preclude providing a federal forum to one whose constitutional rights have been violated. Petitioner argues that neither of these exceptions apply here and urges us to permit him to seek declaratory relief invalidating the Illinois judgment of conviction. We do not quarrel with petitioner's assertion that the federal courts

are usually the ultimate guardians of federal rights. The question presented here, however, is whether section 1983 provides a federal court with the power to inquire into the validity of his fine-only conviction by the Illinois courts.[11] We hold that it does not.

Petitioner, in essence, seeks to collaterally attack the state court judgment of conviction. This is a matter traditionally regarded as within the core of habeas corpus—"an extraordinary remedy whose operation is to a large extent uninhibited by traditional rules of finality and federalism." *Hensley,* 411 U.S. at 351. Yet, as we hold above, petitioner cannot seek a writ of habeas corpus against Illinois because he is not in the state's custody.

In *Preiser* v. *Rodriguez,* 411 U.S. 475 (1973), the Supreme Court held that habeas corpus provides the exclusive federal remedy for prisoners attacking the fact or duration of their confinement. Consequently, it would not permit a section 1983 attack in an action in which habeas would lie. We think that Congress intended that habeas corpus provide not only the exclusive federal remedy for those in custody, but also the exclusive federal remedy for all who seek to attack state court judgments of conviction. Thus, convictions not subject to question in habeas are immune from collateral inquiry by the federal courts. The broad, general terms of section 1983 must necessarily yield to the narrower terms of the habeas corpus statute; limitations contained within the more specific statute also limit

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[11] Although it is not clear that petitioner has no remedy in other federal courts, *see* Part V *infra,* we will assume *arguendo* that the federal courts in California will not reach the merits of petitioner's constitutional claim.

the availability of remedies under the more general statute. We therefore adopt the reasoning of *Cavett* v. *Ellis*, 578 F.2d 567 (5th Cir. 1978):

> Stripped to the bone, the plaintiff's action under § 1983 is little more than a habeas corpus action without a custody requirement. We do not believe that § 1983 was meant to be a substitute for habeas corpus when there is no custody. Under 28 U.S.C. § 2254, we have authority to grant habeas corpus relief to persons in custody pursuant to judgments of state courts. This is the Great Writ, and we endeavor to make it available to those suffering under unconstitutional imprisonment. We have, however, refused to extend habeas corpus relief to those not in custody. Under his theory of § 1983, the appellant would have us sit in perpetual review of all criminal decisions. We will not make the appellant's § 1983 action the greater writ by avoiding the custody requirement of § 2254 indirectly while refusing to extend the custody requirement directly.

Id. at 569.[12]

Our holding that the habeas corpus statute carries with it a penumbral effect which precludes a 1983 action which would nullify a prior state criminal conviction is consistent with the principles of federalism, comity, and equity which govern the exercise of the power of the federal

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[12] *Contra, Shipp* v. *Todd*, 568 F.2d 133 (9th Cir. 1978) (per curiam); *cf. Pueschel* v. *Leuba*, 383 F.Supp. 576 (D. Conn. 1974). The court's brief opinion in *Shipp* does not discuss the relationship between section 1983 and federal habeas corpus. In *Pueschel* the court did not resolve the issue because it found that even if the action could be maintained under section 1983, collateral estoppel precluded litigation on the merits. We find the analysis of the Fifth Circuit more persuasive.

courts.[13] In *Huffman* v. *Pursue, Ltd.*, 420 U.S. 592 (1975), the Court, although in a context different than the one presented here, noted the narrow role of federal courts when reviewing matters which could have been raised on appeal in the state courts:

> Federal post-trial intervention, in a fashion designed to annul the results of a state trial . . . deprives the States of a function which quite legitimately is left to them, that of overseeing trial court dispositions of constitutional issues which arise in civil litigation over which they have jurisdiction. We think this consideration to be of some importance because it is typically a judicial system's appellate courts which are by their nature a litigant's most appropriate forum for the resolution of constitutional contentions. . . . In short, we do not believe that a State's judicial system would be fairly accorded the opportunity to resolve federal

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[13] *Cf. Development in the Law—Section 1983 and Federalism*, 90 Harv. L. Rev. 1133, 1337-38 (1977):

> Federal habeas corpus is, of course, one instance where the costs of collateral attack are incurred. But because federal habeas corpus may be invoked only after the exhaustion of available state remedies, the states retain the opportunity to review and correct their judgments prior to federal intervention. More importantly, federal habeas corpus rests on the paramount importance of freedom from unlawful restraint. And even in the face of this compelling justification, the Supreme Court has recently restricted the circumstances in which collateral attack on a writ of habeas corpus is available. Whether or not cutbacks in the availability of federal habeas corpus are wise, it seems clear that in cases where habeas review is not available, permitting attack on state judgments through actions brought under section 1983 cannot be justified in light of the costs involved and the constraints imposed by the continued viability of the *Younger* doctrine.

> issues arising in its courts if a federal district court were permitted to substitute itself for the State's appellate courts.

Id. at 609.[14] It is true that the gist of petitioner's claim is that he was afforded inadequate resources to prosecute his appeal. Nevertheless, given the lack of severity of his sentence and the interests of finality of state court judgments, we think it is inappropriate for a federal court to grant petitioner the relief he seeks. To do so would be to expand the scope of section 1983 far beyond that contemplated by Congress. Petitioner's claim is one that should have been vindicated by appeal to the Illinois Supreme Court and, if necessary, to the United States Supreme Court. *See Mayer* v. *City of Chicago,* 404 U.S. 189 (1971). Direct review by the United States Supreme Court is sufficient to preserve the role of the federal courts as the ultimate guardians of federally guaranteed rights.

The Supreme Court has noted that:

> Resort to habeas corpus . . . results in serious intrusions on values important to our system of government. They include "(i) the most effective utilization of limited judicial resources, (ii) the necessity

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[14] *Compare Wooley* v. *Maynard,* 430 U.S. 705, 711 (1977) (granting relief):

> Here, however, the suit is in no way "designated to annul the results of a state trial" since the relief sought is wholly prospective, to preclude further prosecution under a statute alleged to violate appellees' constitutional rights. Maynard has already sustained convictions and has served a sentence of imprisonment for his prior offenses. He does not seek to have his record expunged, nor to annul any collateral effects those convictions may have, *e.g.*, upon his driving privileges. The Maynards seek only to be free from prosecutions for future violations of the same statutes.

> of finality in criminal trials, (iii) the minimization of friction between our federal and state systems of justice, and (iv) the maintenance of the constitutional balance upon which the doctrine of federalism is founded."

Stone v. *Powell,* 428 U.S. 465, 491 n.31 (1976). We decline to accept petitioner's invitation to impinge upon these values in the absence of unambiguous Congressional authorization.[15] We hold that petitioner fails to state a cause of action under 42 U.S.C. § 1983.

V. Conclusion

Our decision in this case does not necessarily foreclose the petitioner from obtaining relief against the use of the Illinois conviction by California parole authorities. Although we, of course, express no opinion on the merits, we note that petitioner may have several nonfrivolous theories to prevent California parole officials from considering his

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[15] *See also Developments in the Law—Section 1983 and Federalism,* 90 Harv. L. Rev. 1133, 1136 (1977):

> Such a rule [permitting litigants to impeach adverse state court judgments by raising their federal claims in a subsequent 1983 action and obtaining federal relief nullifying the effects of those judgments] would be costly both in terms of federal-state tensions and judicial economy, for it would deny state courts their usual competence to decide with finality questions that are within their jurisdiction and would hamper the state's ability to enforce its substantive law. Only if one believed that state courts were systematically either unwilling or unable to enforce federal constitutional rights could such costs be justified. To adopt such an argument, however, and to allow state judgments thus to be impeached, is wholly inconsistent with the logic and application of the *Younger* doctrine.

allegedly void Illinois conviction. First, the federal courts in the Ninth Circuit may hold that California's custody of petitioner provides a sufficient jurisdictional basis to inquire into the validity of the Illinois conviction if, as petitioner alleges, the conviction prolongs petitioner's confinement in prison. *See* cases cited note 10 *supra.* Second, in *United States* v. *Tucker,* 404 U.S. 443 (1972), and *Loper* v. *Beto,* 405 U.S. 473 (1972), the Supreme Court held that the use of a prior, constitutionally infirm conviction to "enhance punishment" or "support guilt" amounted to an independent violation of due process. Although *Tucker* and *Loper* involved the use of prior convictions obtained in violation of the defendant's Sixth Amendment right to counsel, lower courts subsequently have extended the rule to embrace prior convictions tainted by other constitutional defects. *See, e.g., Jefferson* v. *United States,* 488 F.2d 391 (5th Cir. 1974) (self-incrimination). *But see Tisnado* v. *United States,* 547 F.2d 452 (9th Cir. 1976) (Fourth Amendment). Arguably, petitioner's claim under the *Griffin-Douglas* principle casts sufficient doubt on the probativeness of his Illinois conviction to fall within the *Tucker-Loper* rule. Is so, and if the courts extend the principle to exclude consideration of void prior convictions by parole authorities, *see Strauder* v. *Troy,* 571 F.2d 1263, 1269-70 (4th Cir. 1978), petitioner may maintain an appropriate action against the California parole authorities to prevent them from considering the Illinois conviction. In any event, these are theories that petitioner may pursue against California—not Illinois—officials.

It may seem anomalous that petitioner, in order to attack the validity of his Illinois conviction, must maintain his action against California and not directly against Illinois. Such an indirect route to challenge the conviction

may seem wasteful of judicial resources.[16] Nevertheless, the custody requirement of the federal habeas corpus statute dictates that petitioner has no federally cognizable action against Illinois either in habeas corpus or under section 1983.

The custody requirement of the federal statute and many state provisions for post-conviction relief have been criticized as overly restrictive. The ABA Standards, for example, would abandon the requirement and permit collateral attack "even though the applicant has completely served the challenged sentence [or] even though the challenged sentence did not commit the applicant to prison, but was rather a fine, probation, or suspended sentence." Standards Relating to Post-Conviction Remedies 2.3 (Approved Draft, 1968). The commentary accompanying the Standards explains the reason for the proposal:

> Frequently, this is made necessary by the application of multiple offender laws which upgrade the authorized or prescribed sentence for a present offense on the strength of the defendant's prior record. Parole consideration is likely to be influenced by the number of previous or concurrent convictions. Civil disabilities of more or less impingement frequently continue after a sentence has been completed.

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[16] *Cf. Loper* v. *Beto*, 405 U.S. 473, 500 (1972) (Rehnquist, J., dissenting):

> It is a sufficiently difficult task for a federal district court sitting in Texas to review a Texas state criminal proceeding for constitutional error. . . .
>
> It is a good deal more difficult for the same Texas habeas court to make a second-level collateral review of judgments of conviction rendered in the state courts of Mississippi and Tennessee.

Petitioner's complaint would seem to fall precisely within the class of cases which the drafters of the Standards had in mind. The need for relief may be apparent, but the abandonment of the custody requirement is a matter for legislative, not judicial, action. Both Congress and the Illinois legislature can fashion appropriate relief for persons in petitioner's predicament. We decline to do so, either by reading the custody requirement out of the federal habeas corpus statute or by circumventing the requirement by an expansive construction of section 1983.

The judgment of the district court is AFFIRMED.

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Teste:

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Clerk of the United States Court of Appeals for the Seventh Circuit

Supreme Court, U. S.
FILED
MAY 23 1980
MICHAEL RODAK, JR., CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

No. 79-1679

WASTE MANAGEMENT
OF WISCONSIN, INC.,
Petitioner,

v.

CYNTHIA FOKAKIS,
Respondent.

BRIEF OF RESPONDENT IN RESPONSE TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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IN THE

SUPREME COURT OF THE UNITED STATES

No. 79-1679

WASTE MANAGEMENT
OF WISCONSIN, INC.,
Petitioner,

v.

CYNTHIA FOKAKIS,
Respondent.

BRIEF OF RESPONDENT IN RESPONSE TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

The respondent, Cynthia Fokakis, by her attorneys, Bronson C. La Follette, Attorney General, and F. Thomas Creeron III, Assistant Attorney General, requests that a writ of certiorari not issue to review the judgment and opinion of the United States Court of Appeals for the Seventh Circuit entered in this proceeding on February 1, 1980. Alternatively, respondent requests that certiorari be granted with respect to the two major questions presented below, and that the decision of the court of appeals be summarily affirmed.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Seventh Circuit is reported at 614 F.2d 138 (7th Cir. 1980). The opinion of the district court appears in the appellant's appendix at page eight.

JURISDICTION

The jurisdictional requisites are set forth in the petitioner's jurisdictional statement.

STATUTORY PROVISIONS INVOLVED

28 U.S.C. § 2254 (a), "State Custody; remedies in Federal courts,"

> The Supreme Court, a Justice thereof, a circuit judge, or a district court shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States.

28 U.S.C. § 1343 and 42 U.S.C. § 1983 are set forth in full in the petitioner's brief at page three.

QUESTIONS PRESENTED

1. Whether jurisdiction exists over the subject matter of an action brought to challenge the terms and conditions of a criminal conviction by a corporate plaintiff.

2. Whether this action is barred by *res judicata* or collateral estoppel, even if subject matter jurisdiction is found to exist.

STATEMENT OF THE CASE

On July 31, 1975, a jury convicted Waste Management, Inc., petitioner herein, of the crime of conspiracy to restrain trade in violation of Wis. Stats. § 133.01. A $4,000.00 fine was imposed. Appeal was taken to the Wisconsin Supreme Court where no less than twenty-nine separate issues were raised. *State v. Waste Management of Wisconsin, Inc.*, 81 Wis. 2d 555, 261 N.W. 2d 147 (1978). Certiorari was subsequently denied by this Court. *Waste Management of Wisconsin, Inc. v. Wisconsin*, 439 U.S. 865 (1978).

In its complaint in the federal district court, Waste Management, Inc., set forth eight claims for relief. Each claim described a separate course of conduct allegedly engaged in by the trial judge or the prosecutor, although neither of them were named as defendants. Each of these courses of conduct, in turn, were claimed to have resulted in a violation of the federal constitutional rights of Waste Management, Inc., at the trial level of the state criminal proceedings.

Waste Management, Inc., styled its action as one for declaratory and injunctive relief, seeking a return of the $4,000.00 fine and expungement of its criminal record. This relief was sought against Cynthia Fokakis, the Clerk of Circuit Court for Dane County, Wisconsin, who was the sole defendant in the action below.

The respondent moved to dismiss the complaint on four grounds, two of which would be dispositive of this litigation. The first ground asserted was that a federal district court lacked subject matter jurisdiction to entertain an action brought by a corporate plaintiff to challenge the terms and conditions of a criminal conviction. A second ground asserted by respondent was that the collateral attack on the criminal conviction was barred by *res judicata* and/or collateral estoppel.

The district court dismissed the action for lack of subject matter jurisdiction, relying solely on *Hanson v. Circuit Court of First Judicial Circuit*, 591 F.2d 404 (7th Cir. 1979), *cert. denied*, ___ U.S. ___, 100 S.Ct. 220 (1979).

The Seventh Circuit Court of Appeals affirmed on the same ground, holding that such a challenge would destroy the "balance Congress struck between the interest of the individual in remaining free of unlawful intrusion on his physical freedom and the state courts' interest in remaining free of federal interference with their final judgments." *Waste Mgmt. of Wisconsin, Inc. v. Fokakis*, 614 F.2d 138, 140-41 (7th Cir. 1980). The court of appeals also reasoned that, by virtue of its affirmative election of the advantanges inhering in the corporate form, Waste Management, Inc. is compelled to accept the attendant disadvantage that a corporate plaintiff may not collaterally attack the terms and conditions of a state criminal conviction. 614 F.2d at 141-42.

Petitioner has requested that a writ of certiorari be issued to review the decision of the Seventh Circuit Court of Appeals. Respondent requests that certiorari be denied, or alternatively, that the decision granting respondent's motion to dismiss be summarily affirmed on both major grounds raised by the respondent below.

ARGUMENT

I. The Decision Of The Court Of Appeals Is Not In Conflict With The Decisions Of This Court.

With reference to the initial question of subject matter jurisdiction, this Court has held that a prisoner challenging the terms and conditions of a state criminal conviction may not utilize 42 U.S.C. § 1983,

but must resort to habeas corpus under 28 U.S.C. § 2254. *Preiser v. Rodriguez*, 411 U.S. 475 (1973). 28 U.S.C. § 2254 contains a custody requirement. Since a corporation can never be incarcerated, it can never satisfy that requirement. Although the definition of custody has become extremely broad, this Court has never permitted an attack on the terms and conditions of a criminal conviction unless the custody requirement was satisfied. *See Preiser v. Rodriquez*, 411 U.S. 475, 486, n. 7 (1973).

Petitioner argues that the reasoning contained in *Preiser v. Rodriguez* does not apply to this case because the corporation has never been in custody. Petitioner also argues, in effect, that a federal forum must be available to vindicate federal constitutional claims, and that 42 U.S.C. § 1983 must be construed accordingly.

The latter argument is untenable. The decisions of this Court indicate that there is no absolute guarantee that a federal forum will be available for the vindication of every single federal constitutional right. Under certain circumstances, fourth amendment claims will not be entertained in the federal courts. *Stone v. Powell*, 428 U.S. 465 (1976). Similarly, there is no assurance that federal constitutional claims which have been litigated in the state courts will be reexamined. *England v. Louisiana State Bd. of Med. Exam.*, 375 U.S. 411 (1964). Most recently, in *Chapman v. Houston Welfare Rights Org.*, 441 U.S. 600, 99 S.Ct. 1905 (1979), it was held that civil rights claims bottomed solely on the Supremacy Clause are not cognizable in the federal courts under 42 U.S.C. § 1983. The decision below expressly recognized this proposition: "As we said in *Hanson*, '[d]irect review by the United States Supreme Court is sufficient to preserve the role of the federal courts as the ultimate guardians of federally guaranteed rights.' 591 F.2d at 411." *Waste*

Mgmt. of Wisconsin, Inc. v. Fokakis, 614 F.2d at 141. *Cf. Huffman v. Pursue, Ltd.*, 420 U.S. 592, 606, n. 18 (1975). Thus, the mere fact that there is no federal forum for petitioner's federal constitutional claims is not inconsistent with the decisions of this Court.

The former argument ignores the intent of Congress in enacting and repeatedly amending the federal habeas corpus statute, 28 U.S.C. § 2254. The purpose of this statute is to foster the principle of federalism by maintaining the integrity of the states' judicial systems. *Cf. Preiser v. Rodriguez*, 411 U.S. 475, 490-91 (1973). *See also Stone v. Powell*, 428 U.S. 465, 491, n. 31 (1976). 28 U.S.C. § 2254 must be interpreted "in light of the purposes Congress sought to serve." *Chapman v. Houston Welfare Rights Org.*, 441 U.S. 600, 99 S.Ct. 1905, 1911 (1979). In applying the principle of federalism, special deference must be paid to a state concerning the operation of its criminal court system. *Cf. Younger v. Harris*, 401 U.S. 37 (1971). The sanctioning of this and similar legal actions by corporate and individual plaintiffs would entirely ignore "the necessity of finality in criminal trials." *Stone v. Powell*, 428 U.S. at 491. Federal courts would be required to "sit in perpetual review of all criminal decisions." *Cavett v. Ellis*, 578 F.2d 567, 569 (5th Cir. 1978). In holding that an action challenging the terms and conditions of a state criminal conviction is, in reality, a federal habeas corpus action, the fifth and seventh circuits used language almost identical to that used by the Court in deciding a similar issue:

> In amending the habeas corpus law in 1948, Congress clearly required exhaustion of adequate state remedies as a condition precedent to the invocation of federal judicial relief under those laws. *It would wholly frustrate explicit congressional intent to hold that the*

> *respondents in the present case could evade this requirement by the simple expedient of putting a different label on their pleadings. In short, Congress has determined that habeas corpus is the appropriate remedy for state prisoners attacking the validity of the fact or length of their confinement, and that specific determination must override the general terms of* § 1983.

Preiser v. Rodriguez, 411 U.S. 475 at 489-90 (emphasis supplied). *See Hanson v. Circuit Court of First Judicial Circuit*, 591 F.2d 404, 411 (7th Cir. 1979) and *Cavett v. Ellis*, 578 F.2d 567, 569 (5th Cir. 1978).

Because the decision in this case does not conflict with decisions of this Court, a writ of certiorari should not issue to review the decision of the Seventh Circuit Court of Appeals.

II. If This Court Deems The Conflicts Among The Circuit Courts Of Appeal To Be Significant, It Should Resolve Those Conflicts By Summary Affirmance Of The Decision Below.

It must be conceded that there is a conflict among the circuits with regard to both major questions presented below./[1]

/[1]There is also an apparent conflict among the circuits concerning a third claim made by respondents below. Respondent also asserted that an action of this nature cannot be maintained against a county clerk of a circuit court, because the county official has no interest in the outcome of the proceedings. *Compare, Cavett v. Ellis*, 578 F.2d 567, 570, n. 6 (5th Cir. 1978) *with Shipp v. Todd*, 568 F.2d 133 (9th Cir. 1978).

One of the underpinnings of the decision made by the seventh circuit below is that habeas corpus provides the sole federal remedy for collateral attack on a state judgment of conviction. 614 F.2d at 140. This position is not adhered to by all circuit courts of appeal. *Compare Hanson v. Circuit Court of First Judicial Circuit,* 591 F.2d 404 (7th Cir. 1979) and *Cavett v. Ellis,* 578 F.2d 567 (5th Cir. 1978) *with Strader v. Troy,* 571 F.2d 1263 (4th Cir. 1978) and *Shipp v. Todd,* 568 F.2d 133 (9th Cir. 1978). *See Hanson v. Circuit Court of First Judicial Circuit,* ___ U.S. ___, 100 S.Ct. 220 (1979) (denying certiorari) (White, J., dissenting). However, no court of appeals has ever held that a corporation may challenge the terms and conditions of a state criminal conviction.

The conflict among the circuits as to the applicability of the doctrines of *res judicata* and/or collateral estoppel in actions under 42 U.S.C. § 1983 is amply documented in *McCurry v. Allen,* 606 F.2d 795, 797-99 (8th Cir. 1979). The Court now has an opportunity to resolve this question since certiorari has been granted. *Allen v. McCurry,* ___ U.S. ___, 100 S.Ct. 1012 (1980).

Without exception, the decisions of those circuit courts of appeal which support the respondent's position are better reasoned.

As to the issue of subject matter jurisdiction, the decisions of the fourth and ninth circuits antedate those of the fifth and seventh circuits. Neither the fourth nor the ninth circuit examined 42 U.S.C. § 1983 in conjunction with 28 U.S.C. § 2254. There is no indication that the question of subject matter jurisdiction was ever raised in the two earlier decisions. The dissenting member of the panel in the fourth circuit did not rely upon the issue of subject matter jurisdiction to support his position. The fifth circuit was the

first to critically examine the issue of subject matter jurisdiction in light of the appropriate statutes. The seventh circuit had the benefit of both lines of analysis before reaching its decision. Upon examining those analyses, the seventh circuit agreed with the fifth circuit that to allow a plaintiff who only paid a fine to challenge a state court criminal conviction would effectively emasculate the custody requirement of the federal habeas corpus statute. *Hanson v. Circuit Court of First Judicial Circuit,* 591 F.2d 404, 410 (7th Cir. 1979).

As to the second question presented, this Court has three times indicated in dictum that actions under 42 U.S.C. § 1983 are governed by normal rules of *res judicata* and/or collateral estoppel. *Huffman v. Pursue, Ltd.,* 420 U.S. 592, 606 n. 18 (1975); *Wolff v. McDonnell,* 418 U.S. 539, 554 n. 12 (1974); *Preiser v. Rodriguez,* 411 U.S. 475, 497 (1973). At least seven circuit courts of appeal have held at various times that *res judicata* and/or collateral estoppel are viable defenses in an action under 42 U.S.C. § 1983. *McCurry v. Allen,* 606 F.2d 795 at 797-98. *See also Goss v. State of Illinois,* 312 F.2d 257 (7th Cir. 1963).

Should certiorari be granted, this second question should be decided because it was properly raised below. In its complaint filed in the federal district court, petitioner affirmatively alleged that all of its federal constitutional claims were raised in the state courts. Respondent moved to dismiss not only for lack of subject matter jurisdiction but also for failure to state a claim upon which relief could be granted. It is apparent that the Wisconsin Supreme Court gave plenary consideration to petitioner's federal constitutional claims. *State v. Waste Management of Wisconsin, Inc.,* 81 Wis. 2d 555, 261 N.W.2d 147 (1978).

Since it was provided with an opportunity to fully and fairly litigate its federal constitutional claims in the state courts and it chose to do so, petitioner should now be precluded from reasserting the identical claims in a collateral federal action.

The overwhelming weight of authority supports the position of the respondent with respect to both questions presented. Under such circumstances, if a writ of certiorari should issue, summary affirmance is a proper vehicle to resolve conflicts among the circuit courts of appeal. *United States v. Lane Motor Co.*, 344 U.S. 630 (1953). *See also Brotherhood of Loc. Eng. v. B. & O. R. Co.*, 372 U.S. 284 (1963). Because the decision of the Seventh Circuit Court of Appeals is in harmony with all pertinent decisions of this Court, a writ of certiorari should not issue. If a writ does issue, the decision below should be summarily affirmed.

CONCLUSION

For all of the foregoing reasons, it is respectfully requested that this Court not issue a writ of certiorari to review the judgment and opinion of the Seventh Circuit Court of Appeals. In the alternative, the decision granting respondent's motion to dismiss should be summarily affirmed on the two major grounds raised by the respondent below.

Dated at Madison, Wisconsin, this 22nd day of May, 1980.

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No. 79-1679

In the Supreme Court of the United States

OCTOBER TERM, 1979

WASTE MANAGEMENT OF WISCONSIN, INC.,

Petitioner,

vs.

CYNTHIA FOKAKIS,

Respondent.

REPLY BRIEF FOR PETITIONER IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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I.

THIS COURT RECENTLY REAFFIRMED THAT HABEAS CORPUS IS NOT THE SOLE REMEDY FOR RELIEF FROM AN UNCONSTITUTIONAL CONVICTION.

Respondent, at pages 4-6 of her brief, misinterprets the holding of this Court in *Preiser* v. *Rodriguez,* 411 U.S. 475 (1973), to be that habeas corpus is the exclusive method for challenging all state court convictions in federal court. All *Preiser* held was that for persons *in custody,* habeas corpus was the exclusive remedy avail-

able. That result followed a determination that while both habeas corpus and 42 USC §1983 relief were conceptually available to prisoners, the more specific applicability of habeas corpus must override the more general applicability of §1983. 411 U.S. at 490.

The reasoning of *Preiser* was never intended to, and logically could not, affect challenges from petitioners not in custody. Furthermore, this Court has never held that other forms of relief from unconstitutional convictions could not be utilized by those to whom habeas corpus is unavailable. Indeed, just this term the opposite view was renewed.

In *Lewis* v. *United States,* ..... U.S. ....., 26 Crim. L. Rptr. 3095, 3098 (1980) this Court cited *United States* v. *Morgan,* 346 U.S. 502 (1954) for the proposition that a person who has been convicted of a felony can obtain relief from his conviction even though he is no longer in any custody. The specific issue in *Morgan* was whether federal habeas corpus (28 U.S.C. §2255) was intended by Congress to be the exclusive remedy available to a felon to attack a federal criminal conviction. Morgan had completely served his sentence and sought relief from his conviction by commencing an action for a writ of *coram nobis.* This Court held that the convicted felon could obtain relief even though he was not in custody at the time of the commencement of his action. The Court stated:

> "The contention is made that § 2255 of Title 28, U.S.C., providing that a prisoner 'in custody' may at any time move the court which imposed the sentence to vacate it, if 'in violation of the Constitution or laws of the United States,' should be construed to cover the entire field of remedies in the nature of coram nobis in federal courts. We see no compelling reason to reach that conclusion. In United States v. Hayman,

> 342 U.S. 205, 219, we stated the purpose of § 2255 was 'to meet practical difficulties' in the administration of federal habeas corpus jurisdiction. We added: 'Nowhere in the history of Section 2255 do we find any purpose to impinge upon prisoners' rights of collateral attack upon their convictions.' We know of nothing in the legislative history that indicates a different conclusion. We do not think that the enactment of § 2255 is a bar to this motion, and we hold that the District Court has power to grant such a motion." *Id.* at 510-511.

The analogy is clear. The existence of habeas corpus to review state court convictions of those *in custody* should have no more effect upon those *not* in custody and to whom the habeas remedy is therefore not available than is the case for those suffering from federal court convictions. Section 1983 actions for non-custody state defendants, like *coram nobis* or other collateral actions for non-custody federal defendants, should be allowed to proceed, at least where, as here, all state remedies have been exhausted. The reaffirmation of *Morgan* in *Lewis* underscores that concept and exposes the Seventh Circuit's error in concluding that there is no federal remedy for those suffering unconstitutional state court convictions who are not in custody.

II.

THE DOCTRINES OF RES JUDICATA AND COLLATERAL ESTOPPEL ARE INAPPLICABLE.

The final argument in the Respondent's Brief has to do with what is claimed to be a proposed application of "normal rules of res judicata and/or collateral estoppel." (Respondent's Brief p. 9.) The Respondent asserts that the Petitioner "was provided with an opportunity to fully and fairly litigate its federal constitutional claims in the

state courts, and it chose to do so," and that the Wisconsin Supreme Court afforded "plenary consideration" to those claims. (Respondent's Brief pp. 9-10.) Consequently, the argument continues, Petitioner should not be allowed to reassert those claims in a "collateral federal action." (Respondent's Brief p. 10.)

The short and definitive answer to this argument, of course, is that it ignores the status of the action and is improper. The case reached the court of appeals and this Court when a motion to dismiss was granted at the district court level. Consequently, the allegations of the complaint are to be taken as true. The court of appeals clearly recognized that and further clearly recognized that those allegations do indeed assert a denial of an opportunity by the state trial court to fully and fairly litigate federal constitutional claims as well as a failure on the part of the state trial and appellate courts to recognize or vindicate certain federal constitutional rights. As a matter of law and procedure, therefore, the position taken by the Respondent in this regard is without merit as well as improper.

As a practical matter, however, the position taken by the Respondent in this regard is actually demonstrative of the Petitioner's complaints. It should be noted that the Respondent's statements in the brief are in fact being made by the Office of the Attorney General for the State of Wisconsin. It was that same office which prosecuted the state criminal case, represented the state before the Wisconsin Supreme Court, and represented the state in response to the original petition for certiorari following the Wisconsin Supreme Court's affirmance of the trial court's judgment of conviction. It is conduct of the attorney general's office during the prosecution which is intimately involved in the denials of federal constitutional rights alleged to have occurred at the trial level. The

inconsistent positions taken by that office since that time not only have obfuscated the issues but also have aggravated the denials of federal constitutional rights.

When the federal constitutional challenges to the trial court conduct and trial level events were presented to the Wisconsin Supreme Court, the attorney general's office argued that there were no such denials. The Wisconsin Supreme Court refused to fully and fairly consider the federal claims made, stating that it was "not a performing bear, required to dance to each and every tune played on an appeal", and that "any of the twenty-nine issues raised and not discussed . . . can be deemed to lack sufficient merit or importance to warrant individual attention." *State* v. *Waste Management of Wisconsin, Inc.*, 81 Wis. 2d 555, 564; 261 NW 2d 147 (1978).

When the Petitioner sought a writ of certiorari concerning that decision of the Wisconsin Supreme Court, the attorney general's office, facing an obvious problem with the Wisconsin Supreme Court's stated refusal to address federal constitutional claims, argued that the Petitioner had failed to raise them. Hence, the Wisconsin Supreme Court's failure to decide them was said to be appropriate. *Waste Management of Wisconsin, Inc. d/b/a City Disposal Company* v. *State of Wisconsin*, Case No. 78-153, October term, 1977, Brief of Respondent in Opposition, Pages 2, 3-4.

As it now suits the State's interest in continuing the avoidance of consideration of the federal claims and in blocking access to a forum for said consideration, the office of the attorney general has blatantly stated that the Petitioner fully and fairly litigated its federal constitutional claims in the state courts and that the Wisconsin Supreme Court properly considered those claims. (Respondent's Brief, pp. 9-10.) The position of the office of the attorney general is demonstrative of the lack of fairness involved in the state court proceedings.

CONCLUSION

On the basis of the original petition and this reply, the petitioner respectfully requests that the Court grant its petition for a writ of certiorari to the United States Court of Appeals for the Seventh Circuit.

Respectfully submitted,

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